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IN THE

SUPREME COURT OF THE UNITED STATES

No. 78-1102

JOHN D. ASHCROFT, Attorney General of the State of Missouri,
and
GEORGE A. PEACH, Circuit Attorney of the City of St. Louis, Missouri,
Defendants-Appellants,

vs.

MICHAEL FREIMAN, M.D. and ALLEN S. PALMER, D.O.,
Plaintiffs-Appellees.

On Appeal from the United States Court of Appeals for the
Eighth Judicial Circuit

MOTION OF PLAINTIFFS-APPELLEES TO AFFIRM THE JUDGMENT SOUGHT TO BE REVIEWED AND BRIEF OF PLAINTIFFS-APPELLEES IN SUPPORT THEREOF

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On Appeal from the United States Court of Appeals for the Eighth Judicial Circuit

MOTION OF PLAINTIFFS-APPELLEES TO AFFIRM THE JUDGMENT SOUGHT TO BE REVIEWED

Come now plaintiffs-appellees and, pursuant to Rule 16 of the Supreme Court Rules (Title 28, U.S.C.A.), move this Honorable Court to affirm the "Memorandum Opinion and Judgment" of May 18, 1973 and the "Order Denying Motion to Modify" of June 20, 1973, as unanimously rendered by the United States Court of Appeals for the Eighth Judicial Circuit, in Appeal No. 78-1144, reported at 584 F.2d 247 (8th Cir. 1978), the Honorable Roy L. Stephenson, Circuit Judge,

Joe McDonald Ingraham, Senior Circuit Judge, and J. Smith Henley, Circuit Judge, presiding.

Plaintiffs-Appellees so move to affirm on the ground that it is manifest that the federal questions raised by defendants-appellants, on which the decision of this cause depends, are so unsubstantial as to need no further argument nor adjudication.

WHEREFORE, plaintiffs-appellees pray this Honorable Court to affirm the decision herein appealed.

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IN THE

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JOHN D. ASHCROFT, Attorney General of the State of Missouri,
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Plaintiffs-Appellees.

On Appeal from the United States Court of Appeals for the
Eighth Judicial Circuit

BRIEF OF PLAINTIFFS-APPELLEES IN SUPPORT OF THEIR MOTION TO AFFIRM THE JUDGMENT SOUGHT TO BE REVIEWED

INTRODUCTION

Plaintiffs-Appellees, for the sake of brevity and the avoidance of unnecessary repetition, adopt by reference the sections of defendant-appellants' Jurisdictional Statement entitled "Jurisdictional Statement" (Jur.St., pp.1-2), "Opinions Below" (Jur.St., p.2), "Jurisdiction" (Jur.St., pp.2-3), "Constitutional Provisions and State Statutes" (Jur.St., pp.3-4) and "Appendix" (Jur.St., pp.1-A through 23-A).

ARGUMENT

A. The Burden Upon Appellants.

This Honorable Court has clearly recognized that the burden of justifying the type of legislation challenged here, which infringes upon the right of a woman and her physician to terminate a pregnancy, lies heavily upon the appellants.

> "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest.' " *Roe* v. *Wade*, 410 U.S. 113, 155 (1973). See, *Paris Adult Theatre I* v. *Slayton*, 413 U.S. 49, 65 (1973).

This principle is particularly applicable where "one's beliefs, ideas, politics, religion, cultural concerns, and the like" become involved; a situation present at bar. *The California Bankers Association* v. *Schultz*, 416 U.S. 21, 86 (1974). See, Gelinas, "Roe *v.* Wade *and* Doe *v.* Bolton: *The Compelling State Interest Test in Substantive Due Process,*" 30 WASH. & LEE L.REV. 628 (1973).

> "Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty." *O'Connor* v. *Donaldson*, 422 U.S. 563, 575 (1975).

The corollary to the "compelling state interest" requirement, "that legislative enactment must be narrowly drawn to express only the legitimate state interests at stake" (*Roe, supra,* 410 U.S. at 155), must also be applied here. It is the "government's burden to demonstrate an overriding interest in order to validate an encroachment on protected interests, . . . cases of doubt being resolved in favor of the . . . [challengers]." *Elrod* v. *Burns*, 427 U.S. 347, 368 (1976). See, *The California Bankers Association, supra,* 416 U.S. at 86.

> ". . . up to the points where important state interests provide compelling justifications for intervention, 'the abortion decision *in all its aspects* is inherently, and primarily, a medical decision,'." *Colautti* v. *Franklin*, 47 LW 4094, 4096 (Jan. 9, 1979).

B. The Merits.

Section 188.040 provides for the arbitrary and conclusive termination of parental rights in the event a live birth results, when an abortion had been intended. It applies to all patients (unless the procedure is life-saving) and to consenting fathers. It applies indiscriminately to all stages of pregnancy despite this Honorable Court's specific prohibitions in *Roe, supra,* 410 U.S. at 163-165. See, *Word* v. *Poelker*, 495 F.2d 1349, 1351 (8th Cir. 1974). It is a crude and coercive threat to dissuade women from freely electing abortion. It is totally unrelated to the concern of maternal health, as uncontradicted by the factual record below, despite the fact that this is the only justification for abortion legislation prior to the point of viability. *Roe, supra,* 410 U.S. at 163-165.

It adopts the dogmatic philosophy of those opposed to abortion under all circumstances: *I.e.*, that abortion is the equivalent of murder. Desiring an abortion and the death of a fetus are not synonymous with desiring the death of a live child, in the event an abortion is not successful. An abortion may not initially be an available option, either for medical or other reasons, or it may be medically impossible once commenced (as envisioned by the statute). This irrebuttable presumption created by the challenged Section of "unfitness" of and/or "abandonment" by a patient electing an abortion, has been specifically rejected by a Florida Appellate Court,

> "Appellant further contends, apart from the question of the 'right to privacy' that the termination of a pregnancy

> illustrates and reflects the 'unfitness of the mother' or 'the abandonment' of the unborn child. . . . Appellant's contentions are equally tenuous and as a practical matter overlook the decisions of the United States Supreme Court . . . . We cannot conclude that a mother's decision to terminate a pregnancy gives rise to questions of 'unfitness' or 'abandonment'." *Jones* v. *Smith*, 278 So.2d 339, 343 (Fla.Ct.App. 1973), *cert denied*, 415 U.S. 958 (1974).

The prohibition against the incorporation into statutes of unwarranted presumptions has been reaffirmed in prior, related cases dealing with sexual (gender) preferences (*Weinberger* v. *Wiesenfeld*, 420 U.S. 636 [1975]), illegitimacy of children (*New Jersey Welfare Rights Organization* v. *Cahill*, 411 U.S. 619 [1973]), and pregnancy (*Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 [1974]). When governmental action "rests on an irrebutable presumption often contrary to fact . . . (i)t therefore lacks critical ingredients of due process." *United States Department of Agriculture* v. *Murry*, 413 U.S. 508, 514 (1973). It has been suggested that such presumptions may be a parameter and/or a surrogate of equal protection, as well as of due process. Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?*, 72 MICH.L.REV. 800 (1974); and Case Comment, *Constitutional Law: Court Substitutes Conclusive Presumption Approach for Equal Protection Analysis*, 58 MINN.L.REV. 965 (1973-1974).

Missouri statutes themselves recognize the lesser value of fetal life by classifying the taking of "the life of a premature infant aborted alive" as "murder of the second degree." (§ 188.035[2]). Absent such specific language, the taking of such life would be considered "murder in the first degree." MO.REV.STAT., § 559.010. In light of *Roe, supra*, this Section is no more sustainable than would be a similar effort to terminate parental rights of persons who experienced contraceptive failure.

Under identical circumstances, in *Doe* v. *Rampton*, 366 F. Supp. 189 (D.Utah 1973), the statute provided,

> "Child surviving abortion deemed ward of state.—Any child surviving an abortion shall become a ward of the state and the mother of such child and a father who has consented to such abortion shall have no parental rights with regard to such child." UTAH CODE ANN., § 76-7-311.

The unanimous federal panel held,

> "Section 76-7-311 is invalid because it threatens every woman who has an abortion, at any stage of pregnancy and for any reason, with termination of parental rights without due process of law." 366 F.Supp. at 193.

Roe, supra, clearly stands for the principle that a pre-viable fetus is not the equivalent at law of a living person. "(T)he word 'person', as used in the Fourteenth Amendment, does not include the unborn." *Roe, supra*, 410 U.S. at 158. This distinction is further demonstrated by the total statutory scheme's permissive stance towards abortion under certain circumstances and conditions.

As this Honorable Court noted in *Stanley* v. *Illinois*, 405 U.S. 645 (1972), when offering full protection to the rights of putative fathers in regard to their children,

> "Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family.
>
> . . .
>
> "We have concluded that all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody. It follows that denying such a hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause." 405 U.S. at 658.

There are no other statutory provisions providing for arbitrary and conclusive termination of parental rights under any other factual situation. Parents of children who commit upon them the greatest abuses, even acts threatening their very lives, are not subject to the gross denial of due process and equal protection attempted here. This vindictive excessive exercise of state power to punish and to deter women from choosing abortion must not be allowed to persist. Nor must the continual assault upon their sensitivities and emotions before undergoing surgery be tolerated any longer.

It is no more reasonable for the state to assume that a woman, who is denied an abortion initially for medical reasons prior to the procedure, is any less committed to the abortion than a woman who is denied an abortion because the intended result of the procedure did not occur during the course of the procedure. Yet, clearly, many women, unable for medical reasons to undergo an abortion, choose to rear the children born to them as loving parents. The singular and obvious purpose of challenged §188.040 is to coerce, to harass and to intimidate women into the choice of carrying to term as opposed to the choice of terminating the pregnancy. Such coercion has been repeatedly denounced. *Wulff* v. *Singleton*, 508 F.2d 1211 (8th Cir. 1974), *reversed on other grounds*, 428 U.S. 106 (1976) and *Nyberg* v. *The City of Virginia*, 495 F. 2d 1342 (8th Cir. 1974), *appeal dismissed for want of jurisdiction*, 419 U.S. 891 (1974).

Challenged §188.040 is not reasonably susceptible to the strained construction suggested by appellants below that the procedures of Missouri Revised Statutes, §211.411, are to be utilized. The challenged Section clearly states, without qualification, that under the given circumstances, "such infant shall be an abandoned ward of the state." Later on, it states that the consenting parents "shall have no parental rights or obligations whatsoever relating to such infant, as if the parental

rights had been terminated pursuant to section 211.411 RSMo." The reference to "section 211.411 RSMo." is clearly and merely a descriptive phrase, defining and analogizing the finality of the rights being terminated. The challenged Section does not say that consenting parents "shall have no rights or obligations whatsoever, if the parental rights are terminated pursuant to section 211.411 RSMo." The words, "had been terminated", demonstrate that the termination is automatic and, in fact, has already occurred, if the conditions of consenting parties were present. The use of the word "as" denotes "to the same extent" or "to the same degree". *Webster's New Collegiate Dictionary.*

Secondly, even assuming, *arguendo*, appellants' strained construction, the Federal constitutional questions remain. As Circuit Judge Webster previously noted in dissent,

> "First, the statutory language rebuts any inference of an intended hearing. It states that as to such live born infant the parent who consented to the abortion 'shall have no parental rights or obligations *whatsoever, as if* the parental rights *had been* terminated pursuant to Section 211.411 [*sic*], RSMo.' (Emphasis added). The only interpretation which I can give to such clause is that parental rights are to be terminated upon the birth of the child as if all of the statutory procedures for termination of parental rights had already taken place. Significantly, Section 211.441, RSMo, does not make a child an abandoned ward of the state prior to hearing as does this Section 7. I do not understand the state to have argued for the construction placed upon Section 7 by the majority, and I cannot accept it. It seems to me abundantly clear that the state proposes to take a live born child away from its parents, if they consented to an abortion, because in the view of the state it was 'unwanted,' and for this reason alone the consenting parents have forfeited all rights to such child. This posture ignores entirely the range of alternatives available and assumes that because a mother

may for a variety of reasons have decided upon an abortion she would with certainty abandon the child if it should be born alive, or, more invidiously, that she thereby became unworthy to keep the child. No state has the right to make this judgment on a per se basis." *Planned Parenthood, supra,* 392 F.Supp. at 1377, *remanded on other grounds,* 428 U.S. 52 (1976).

The District Court found that §188.040 was not defective by reason of applying to all trimesters, because this Honorable Court approved written consent and record-keeping requirements in all trimesters in *Planned Parenthood, supra,* 428 U.S. at 65-67, 78-81. The District Court ignored the fact that this Honorable Court took great pains to point out the rational basis for those specific requirements at all levels of pregnancy. *Ibid.* Even assuming the rationale of the District Court, that reasonable protection of a woman's health justifies in some remote manner the challenged Section, the rationale for the same could only apply to women seeking abortions who are bearing viable fetuses.

The challenged Section itself is totally inconsistent with its supposed purpose of protecting live-born infants from their parents who had previously desired abortions. (1) The legislation terminates equally the parental rights when a live birth results of fathers (spousal and putative) who consented to the abortion and mothers who consented for reasons less than necessary to save their lives or health. (2) It does not terminate the parental rights when live birth results of fathers (spousal and putative) who strongly desire an abortion but do not evidence such feeling through a consent (since their consent is not required), mothers who strongly desire an abortion but forego the same by reason of the danger to their life or health and mothers who actually undergo a strongly desired abortion procedure necessary to save their lives or health, but which produces a live birth. No logical reason exists to assume that

parents in group "(1)" above pose any greater threat to their children than parents in group "(2)". Nor did appellants demonstrate any real threat by any parent to a child born, although an abortion was initially desired or intended.

Parents who, in actuality, do abuse their children, receive more rights of due process than the parents here, whom the state, because of its restrictive view on abortion, speculates *may* not be fit. The distinguishing characteristic between parents (as to whether or not they consent to the abortion) or between consenting parents (as to whether or not the procedure is necessary to save the life or health of the mother) is not rationally related to the parents' desire for an abortion nor to their attitude (actual or anticipated) toward the child once born. Parents with intense desires for an abortion may well be found in either group.

Section 188.040 places upon the physician-appellees the affirmative duty to determine in each case whether: (a) the procedure "was not performed to save the life or health of the mother"; (b) whether the mother consented to such abortion; and (c) whether the father consented to such abortion. After making said determinations and, if the answer to each is in the affirmative, the physician-appellees are compelled to "forthwith notify said juvenile court of the existence of such live born infant." Failure to properly make such determinations and to provide such notification, when required, subjects the physician to the penalties of §§ 188.065 and 188.075 of the challenged legislation. Section 188.045 requires appellees to verbally inform each patient of § 188.040 under threat of criminal sanctions.

Section 188.040 discriminates against children resulting from such abortions by denying to them the right to a relationship and its accompanying duties and rights with their natural mothers.

As succinctly stated previously by Judge William Webster in 1975, dissenting,

> "This section in my view contains an incurable constitutional flaw: it is totally lacking in procedural due process. . . .
>
> "The chilling effect of such legislation is so obvious as to require no further discussion; it clearly and explicitly exceeds regulation 'reasonably related to maternal health'." *Planned Parenthood of Central Missouri* v. *Danforth*, 392 F.Supp. 1362, 1377 (E.D.Mo. 1975), *remanded on other grounds*, 428 U.S. 52 (1976).

As more recently noted by Circuit Judge Webster,

> "Section 7 (R.S.Mo. 1974 §188.040) is perhaps the most offensive of the *in terrorem* clauses that were enacted by the Missouri legislature in 1974, H.C.S. House Bill No. 1211, because it reflects a legislative conclusion that a woman who asserts her constitutional right to an abortion has thereby become unfit for parenthood if the child is somehow born alive. See *Planned Parenthood of Central Missouri* v. *Danforth*, 392 F.Supp. 1362, 1377 (E.D.Mo. 1975) (Webster, J., dissenting). This patently unconstitutional appendage, totally lacking in due process, survives like the last leaf in winter after *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976)." *Freiman* v. *Ashcroft*, 440 F.Supp. 1193, 1195 (E.D.Mo. 1977).

Appellants seek to justify the constitutionality of Mo.R.S. §188.040 by relying on the Supreme Court's language in *Planned Parenthood, supra*, permitting a requirement of written consent to an abortion, that, ". . . it is desirable and imperative that it be made with full knowledge of its nature and consequences." 428 U.S. at 67. Appellants apparently believe that under the

mantle of that broad language, the state is free to mandate physicians to provide to each patient, any and all information required by the state, regardless of its legality, truth, constitutionality and medical advisability.

This Honorable Court, on the same page of its opinion as the language referred to above, *warned* that requiring an informed consent in any specific terms,

> ". . . might well confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession." 428 U.S. at 67, at n.8.

The challenged sections in this cause rigidly lock appellees into such restraints, by legislating the practice of medical consents.

Recently, an unanimous three-judge federal panel held as unconstitutional, requirements that the physician inform each abortion patient of,

> "(a) The physical competency of the fetus at the time the abortion is to be performed, such as, but not limited to, what the fetus looks like, fetus ability to move, swallow and its physical characteristics;
>
> "(b) The general dangers of abortion, including, but not limited to, the possibility of subsequent sterility, premature birth, live-born fetus and other dangers; . . ." Illinois House Bill 1851, Illinois Abortion Law of 1975, Section 3(2). *Wynn* v. *Scott*, 449 F.Supp. 1302, 1332 (N.D. Ill. 1978).

The panel, in language equally applicable here, held,

> "In *Danforth*, the Supreme Court upheld an informed consent provision which was identical to the first sentence of § 3(2) in the Illinois Act. The Court reasoned that requiring written informed consent does not in itself restrict

the decision of the patient and her physician. The Court noted that the decision to abort is 'important' and often 'stressful' and said that 'it is desirable and imperative that it be made with full knowledge of its nature and consequences.' The Court indicated that limits could be placed on the state's ability to regulate informed consent. If the provision at issue in *Danforth* had meant more than what would be done in an abortion and the consequences of the procedure, it 'might well confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession.' *Danforth, supra,* at 67 n.8. In his concurrence, Justice Stewart notes that atlhough a provision must not 'thwart a woman's decision, the state may try to ensure that the abortion decision is made in a knowing, intelligent, and voluntary fashion.'

. . .

"The holding in *Danforth* leaves no doubt that the first sentence of § 3(2) of the Illinois Abortion Act is constitutional. However, the guidelines discussed in *Danforth* raise serious doubts as to the validity of clauses (a) and (b). Plaintiffs argue with considerable force that those clauses thwart and restrict a woman's decision to have an abortion and they are not narrowly drawn to meet the state interest at stake, which is to insure that the woman is aware of her decision and of its significance. . . .

The clauses are . . . overly specific. . . . the very specificity of clauses (a) and (b) places the physician in a 'straitjacket' condemned in *Danforth. For example, a physician performing a first trimester abortion must tell the woman that there is a danger of a live-born fetus, when it is impossible that her abortion will result in a fetus born alive.* And the physician will tell the woman that there is a danger of subsequent sterility despite the fact that studies have not shown that this danger actually exists. . . .

"We conclude that §§ 3(2)(a) and (b) are unconstitutional." *Wynn, supra,* at 1316-1317.

In addition to the over specificity language in *Wynn, supra,* which applied here would void the challenged sections; the federal panel specifically held the following two sections unconstitutional.

"Section 7. In every case where a live born infant results from an attempted abortion which was not performed to save the life or health of the mother, such infant shall be an abandoned ward of the State wherein the abortion occurred, and the mother and father, if he consented to the abortion, of such infant shall have no parental rights or obligations whatsoever relating to such infant. The attending physician shall forthwith notify said juvenile court of the existence of such live born infant."

"Section 8. Any woman seeking an abortion in the State of Illinois, after viability, shall be verbally informed of the provisions of Section 7 of this Act by the attending physician and the woman shall certify in writing that she has been so informed." Illinois House Bill 1851, Illinois Abortion Law of 1975, Sections 7, 8. *Wynn, supra* at 1333.

The federal panel unanimously ruled,

"The court in *Doe* v. *Rampton,* 366 F.Supp. 189, 193 (D.Utah 1973), voided a similar provision because it threatended every woman with termination of parental rights without due process of law.

"Plaintiffs contend that § 7 is unconstitutional because it deprives the parents of their parental rights in the child without due process of law and because it creates an irrebuttable presumption of unfitness. We agree with the first contention and find it unnecessary to reach the second. *Compare Miller* v. *Carter,* 547 F.2d 1314, 1317 (7th Cir. 1977).

"All parents have constitutionally protected rights to have custody of and to care for their children. They may not be deprived of their parental rights without procedural due process of law. They must have adequate notice that the state proposes to remove the children, and an opportunity to prove their fitness as parents at a hearing. *Stanley* v. *Illinois*, 405 U.S. 645 (1971).

"Defendants' justification of § 7 are without merit. First, defendant Carey alleges that although the child is deemed abandoned, the parents of a child who survives an abortion may petition for restoration of parental rights in Juvenile Court under Ill. Rev. Stat., ch. 37, § 705-8(3). Assuming that parents of the child could undo the abandonment, a post-termination hearing still does not comply with the requirements of the due process clause. In *Stanley*, the Court dismissed a similar argument in the context of a statute terminating unmarried fathers' parental rights after the death of the mother without a prior hearing.

> 'We reject any suggestion that we need not consider the propriety of the dependency proceeding that separated the Stanleys because Stanley might be able to regain custody of his children as guardian or through adoption proceedings. This Court has not, however, embraced the general proposition that a wrong may be done if it can be undone.' *Id.* at 648.

"Second, defendant Carey suggets that the state's responsibility to provide for the child's welfare is a legitimate reason for delaying the hearing until after parental rights are terminated. It is true that the state may terminate rights without prior procedural due process in 'extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.' *Boddie* v. *Connecticut*, 401 U.S. 371, 380 (1971). The survival of a child after an abortion may be unexpected, but it is not an extraordinary situation that excuses the normal process safeguards. Other statutory duties adequately preserve the infant's welfare. The physician has an immediate duty to take measures to protect the life of the infant under § 6(1). Parents who do not want to keep the child may voluntarily give up the child for adoption, and this decision is permanent three days after the child is born. Ill. Rev. Stat., ch. 4, § 9.1-9 (1975). The state may bring proceedings against parents who neglect their children. The automatic termination of parental rights is too harsh and is not needed to insure that a child who survives an abortion is given proper care.

"Dr. Diamond contends that § 7 does not terminate parental rights without due process of law because § 8, which provides that a woman seeking an abortion after viability must be informed of § 7, gives her adequate notice. Dr. Diamond reasons that since the woman who wishes to retain parental rights can forego the abortion, she receives notice satisfying the constitutional requirement. This argument is incorrect for two reasons. First, § 8 provides for notice only after viability and § 7 terminates parental rights in abortions before viability. The woman who is subject to the deprivation therefore would not receive notice of it. Second, even if § 8 required notice of termination of parental rights to all women seeking abortions, that notice would only satisfy the first requisite of procedural due process. The parents would still need an opportunity to contest the termination by proving that they were fit.

"Section 7 violates the due process clause of the Fourteenth Amendment and must be stricken. Section 8 is illogical because it requires that a woman be informed of information which could not possibly apply to her. And since it incorporates a constitutionally infirm provision, it, too, must be stricken." (Emphasis supplied). *Wynn, supra*, at 1322-1324.

Appellants, in arguing the merits, inexcusably ignore the clear state of the record. Appellees in their Affidavits positively assert the real, experienced and actual "increased risks of mortality and morbidity" to and the real and actual "jeopard(y) (of) the health, interests and safety" of their patients, by reason of the challenged sections' operation. Appellants' affiant, a physician who has no actual experience with abortion patients, avers that the reaction of patients treated pursuant to the challenged sections "cannot be generalized or predicted" and "may" have certain effects.

Although the constitutionality of § 188.040 of Missouri Revised Statutes is not directly an issue on appeal in this cause, it is imperative to examine the same on its merits in order to determine the validity of related § 188.045.

Several recent non-abortion related decisions by this Honorable Court and by other federal appellate courts strongly support the need to examine simultaneously the merits of § 188.040 here.

> "As a vendor with standing to challenge the lawfulness of §§241 and 245, appellant Whitener is entitled to assert those concomitant rights of third parties that would be 'diluted or adversely affected' should her constitutional challenge fail and the statutes remain in force. . . . Accordingly, vendors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates for the rights of third parties who seek access to their market or function.
>
> . . .
>
> "Indeed, the jus tertii question raised here is answered by our disposition of a like argument in Eisenstadt v. Baird, supra. There, as here, a state statute imposed legal duties and disabilities upon the claimant, who was convicted of distributing a package of contraceptive foam to a third

> party. Since the statute was directed at Baird and penalized his conduct, the Court did not hesitate—again as here—to conclude that the 'case or controversy' requirement of Art. III was satisfied. 405 U.S., at 443. In considering Baird's constitutional objections, the Court fully recognized his standing to defend the privacy interests of third parties. Deemed crucial to the decision to permit jus tertii standing was the recognition of 'the impact of the litigation on the third-party interests.' Id., at 445." *Craig v. Boren*, 429 U.S. 190, 195-196 (1976).

More recently, this Honorable Court held in a contraceptive case,

> "Therefore, PPA is among the 'vendors and those in like position [who] have been uniformly permitted to resist efforts at restricting their operations by acting as advocates for the rights of third parties who seek access to their market or function.' Id., at 195. See also Eisenstadt v. Baird, 405 U.S. 438 (1972); Sullivan v. Little Hunting Park, 396 U.S. 229 (1969); Barrows v. Jackson, 346 U.S. 249 (1953). As such, PPA 'is entitled to assert those concomitant rights of third parties that would be "diluted or adversely affected" should [its] constitutional challenge fail.' " Craig v. Boren, supra, at 195, quoting Griswold v. Connecticut, 381 U.S. 479 (1965).[4]
>
> > "4. Indeed, the case for the vendors standing to assert the rights of potential purchasers of his product is even more compelling here than in Craig, because the rights involved fall within the sensitive area of personal privacy. In such a case potential purchasers 'may be chilled from . . . assertion [of their own rights] by a desire to protect the very privacy [they seek to vindicate] from the publicity of a court suit.' Singleton v. Wulff, 428 U.S. 106, 117 (1976)."

Carey v. *Population Services International*, 431 U.S. 678, 684.

Physician-appellants in a commercial sense are, indeed, vendors of abortion services.

The Eighth Circuit has also recognized the governing principles in allowing standing in analogous situations. See: *Middlewest Motor Freight Bureau* v. *United States of America*, 525 F.2d 681, 683 (8th Cir. 1975); and *Regents of the University of Minnesota* v. *The National Collegiate Athletic Association*, 560 F.2d 352, 363 (8th Cir. 1977).

The District Court attempted to view physician-appellees' standing as to §188.040 in a vacuum, without regard to or consideration of their recognized and admitted standing as to §188.045. Furthermore, the District Court attempted to view the constitutionality of §188.045 also in a vacuum, without regard to or consideration of the substantive provisions of §188.040. The District Court held that these two separately numbered statutes each stood alone and separately for purposes of their legal significance. This myopic view was specifically rejected by this Honorable Court in *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), and *Craig, supra*. In each of those cases, the plaintiffs were permitted to raise the constitutional rights of third parties under related statutes, separately numbered from the statutes under which plaintiffs were threatened with or actually convicted.

In *Eisenstadt, supra*, William Baird was convicted of Massachusetts General Law Ann., Chapter 272, §21, for lecturing on contraception and distributing a contraceptive vaginal foam, although he was not a physician. He was permitted to challenge Massachusetts General Law Ann., Chapter 272, §21A, which unconstitutionally distinguished between married and unmarried persons in the area of contraception. In regard to standing, this Honorable Court noted,

> "In any event, more important than the nature of the relationship between the litigant and those whose rights he seeks to assert is the impact of the litigation on the third-party interests." 405 U.S. at 445.

Both the relationship and the impact are more critical in this cause than they were in *Eisenstadt, supra*. This Honorable Court referred to the related sections as a single "statutory scheme". 405 U.S. at 442.

In *Craig, supra*, Carolyn Whitener was threatened with conviction under Oklahoma Statutes, Title 37, §241, for the sale of liquor to a minor but was held to have standing to challenge as well Oklahoma Statutes, Title 37, §245, defining male minors as under age 21 and female minors as under age 18. This Honorable Court, in its analysis, referred to "(t)he interaction of two sections of an Oklahoma statute". 429 U.S. at 191.

The District Court cited no case in which any other court has dissected related legislation in such a manner, so as to exclude an immediately preceding, consecutively numbered and simultaneously enacted section without which the subsequent section is meaningless and unenforceable.

The Eighth Circuit has repeatedly recognized that,

> "In construing the statute, we adhere to the basic canon of construction observed in Richards v. United States:
>
> > 'We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, "we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy".' 369 U.S. 1, 11, 82 S.Ct. 585, 591, 7 L.Ed.2d 492 (1962).

And as stated in 2 Sutherland, Statutory Construction § 2802, at 215 (3d ed. 1943), '[t]he statute should be

construed according to its subject matter and the purposes for which it was enacted.' Over a century ago, Lord Campbell noted, '[i]t is the duty of the Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the *whole scope* of the statute to be construed.' " *The State Highway Commission of Missouri* v. *Volpe*, 479 F.2d 1099, 1111 (8th Cir. 1973). See, also, *Burrow* v. *Finch*, 431 F.2d 485 (5th Cir. 1970).

Physicians have recently been held to have standing to defend the privacy rights of their patients by challenging a Conflict of Interest Law. *Falcon* v. *Alaska Public Offices Commission*, 570 P.2d 469, 475 (Alaska 1977).

The Eighth Circuit in its opinion below unequivocably stated the absolute necessity of examining § 188.040 to determine, in part, the validity of § 188.045 before it.

> "The legitimate state interest at stake here is protecting the mother by requiring an informed consent to the abortion decision. The Court in *Danforth* held that Mo. Ann.Stat. § 188.020(2) (Vernon 1978),[5] Missouri's informed consent provision, was not 'in itself an unconstitutional requirement. The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences.' *Planned Parenthood* v. *Danforth, supra*, 428 U.S. at 67, 96 S.Ct. at 2840. But the Supreme Court did not hold that a state may require physicians to provide to each patient any and all information required by the state, *regardless of its legality, truth, constitutionality or medical advisability*. [W]e are content to accept, as the meaning [of informed consent], the giving of information to the patient as to just what would be done and as to its consequences. To ascribe more meaning that this might well confine the attending physician in an undesired and

uncomfortable straitjacket in the practice of his profession. *Planned Parenthood* v. *Danforth, supra*, 428 U.S. at 67 n. 8, 96 S.Ct. at 2840. Section 188.045 is not sufficiently narrowly drawn to express only the legitimate state interests at stake. *Roe* v. *Wade, supra*, 410 U.S. at 155, 93 S.Ct. at 728.

The information that section 188.045 requires the physician to relate to his patient prior to an abortion operation would most certainly put the physician in a straitjacket. It first requires the physician to warn his patient of consequences that should not occur, as the Missouri Act was written to prevent just such an event. The statutes provide that no abortion may be performed—unless it is to preserve the life or the health of the mother—without the physician first certifying that the fetus is not viable. Section 188.040's provision for termination of parental rights only occurs if a live born infant results from an attempted abortion which was not performed to save the life or health of the mother. Thus, the warning, that if a live born infant results parental rights will be terminated, is for all practical purposes meaningless. By definition, this should not result.

Secondly, although requiring the physician to tell his patient what will be done to accomplish the abortion and what the consequences will be assists the patient in being able to give an informed consent, *Planned Parenthood* v. *Danforth, supra*, 428 U.S. at 66-67, 96 S.Ct. 2831, the requirement that the physician tell his patient of section 188.040 is not reasonably related to the purpose of informed consent. Initially, section 188.045 makes no distinction between trimesters and thus is overbroad. Then the statute which section 188.045 requires the physician to relate to his patient is patently a denial of procedural due process, and further, there is no record of an unsuccessful abortion performed during the first 12 weeks of gestation

resulting in a live born infant. The result of a physician's warning would be to inject into the decision-making process between physician and patient a factor which is irrelevant and extraneous to the medical services being rendered. Section 188.045's imposition upon the physician to inform his patient of section 188.040 is a violation of the equal protection clause of the Fourteenth Amendment inasmuch as it singles out the abortion operation for the imposition of this straitjacket requirement. It is a violation of the due process clause because of the invasion into the delicate and private physician-patient relationship. Requiring the physician to relate section 188.040 interferes with the woman's right to consult with her physician concerning her decision of abortion without undue restriction by the state. *See Wynn* v. *Scott, supra,* 449 F.Supp. at 1316-17. Thus this court finds section 188.045 to be unconstitutional." 584 F.Supp. at 251-252.

CONCLUSION

Appellants' argument suggests a situation totally unique in American jurisprudence. Physician-appellees are mandated by law, under criminal sanctions of imprisonment, fine or both, for violation, to speak certain prescribed words to their patients; yet they may not inquire into the substance and validity of the words they must speak. It may well be surmised that under the District Court's reasoning, pregnant patients desiring abortions would also lack the requisite standing and that only women who have experienced a live birth as a consequence of an abortion would have the necessary standing. This, despite the fact that the uncontradicted record reveals that this statute, in its present posture and application, creates a present and recurring danger and threat to the health of abortion patients. To consider the merits of §188.045 without a consideration of the merits of

§188.045 would be an anomaly and an aberration of the law and of due process.

Respectfully submitted,

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Certificate of Service

I hereby certify that true and correct copies have been mailed by first class postage with postage prepaid, all pursuant to Supreme Court Rule No. 33, to Mr. Michael L. Boicourt, Assistant Attorney General, Supreme Court Building, Jefferson City, Missouri 65101, Attorney for Appellants.

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Frank Susman